

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATIONS No 1664, 1667,
1668, 1670, 1672, 1675, 1678, 1679 AND 1680 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL and
MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes

2. To be referred to the Reporter or not? Yes

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

2 - 5 No

SURAJ STEEL ROLLING MILLS

Versus

UNION OF INDIA

Appearance:

Special C.A. No. 1664 & 1667 of 1999

MR PARESH M DAVE for Petitioner
Mr R J Oza, for Respondent No. 1

Special C.A. No. 1668, 1670 & 1672 of 1999

Mr Paresh M Dave for petitioners
Mr R C Jani for respondents

Special C.As. No.1675, 1678, 1679 & 1680 of 1999

Mr Paresh M Dave for petitioners
Mr M R Shah for respondents

CORAM : MR.JUSTICE B.C.PATEL and

MR.JUSTICE A.L.DAVE

Date of decision: 08/03/99

ORAL JUDGEMENT

RULE. M/s R J Oza, R C Jani and Mr M R Shah waive service of Rule on behalf of the respondents.

At the request of the learned Advocates for the parties, these matters are taken up, heard and disposed of finally.

In all these petitions, the question of law and facts raised by the learned Advocates being the same, these petitions are disposed of by a common judgment.

2. Petitioners, by orders passed by adjudicating authority, were required to pay different amounts from Rs.4,26,000/- to Rs.8,60,000. The orders were passed in the month of July and August, 1995. Against the aforesaid orders, the Appeals were preferred before the Commissioner (Appeals), Central Excise and Customs, Ahmedabad. The Appellate Authority, before considering the appeals on merit, found that the appellants did not comply with the directions whereby they were directed to deposit the amounts by 15.10.1997. They failed to comply with the provisions of Section 35F of the Central Excise Act, 1944 which are mandatory. According to the Commissioner (Appeals), the appeals could not be maintained, entertained and heard on merit. In the opinion of the Commissioner (Appeals), as the conditions were not fulfilled, the Appeals were required to be dismissed for non-compliance of the provisions of Section 35F of the Central Excise Act, 1944 and accordingly dismissed the appeals. Reading para 6 of the order passed by the Commissioner (Appeals), on 24.10.1997, it is clear that the applications for stay were submitted and direction was given to deposit the amounts by 15.10.1997.

3. Being aggrieved by the orders of dismissal of appeals, nine appeals were preferred before the Customs, Excise and Gold (Control) Appellate Tribunal (hereinafter referred to as 'CEGAT'), West Regional Bench at Bombay. After considering the facts in short, the Tribunal pointed out that in all these cases, the appellants failed to comply with the directions of pre-deposit of

the duty demanded in terms of Section 35F of the Central Excise Act, 1944, hence, the Commissioner (Appeals) dismissed all the appeals. It appears that the attention of the Tribunal was invited wherein similar situation was required to be considered in 25 appeals. In those group of appeals, before the Tribunal, it was given to understand to the Tribunal that they have made pre=deposit which has been noted in the annexures to the orders. It appears that as the amount as required to be deposited, namely; pre-deposit, was already deposited, the Tribunal issued directions to the Comissioner (Appeals) to hear the appeals on merit, on their showing that they have deposited the amount. Thus, the statement was made before the Tribunal that the amount has been paid, yet for the sake of precaution, the Tribunal stated that only on showing that they have pre-deposited the amount, the appeals will be entertained.

4. In the instant cases, the Tribunal directed as under:

"We set aside the impugned order and remand the matter to the Commissioner of Central Excise (Appeals), Ahmedabad to give opportunity to these Appellants to put forth their case on merits subject to their showing that they have pre-deposited the disputed duty amount."

5. In view of the orders, the stay applications and appeals were disposed of. It was given to understand that appellants have pre-deposited the amount. The Tribunal, therefore, passed a specific order i.e. subject to condition referred in the order. That order has become final In view of stay being not granted, if appellants would have approached the higher forum challenging the said orders, matters would stand on different footing. In these cases, considering para 4 which is quoted from group of 25 appeals and para 5 of the order passed by the Tribunal, it is clear that order was ad-invitem. Before this Court, the order passed on stay application by Commissioner (Appeals) or the order in that subject matter passed by the Tribunal is not challenged. Order passed by Commissioner (Appeals) dismissing the appeal and the Tribunal issuing direction coupled with condition of hearing appeal on merit only on showing that the appellant has pre-deposited the amount become final.

Thus, the matter was remanded subject to the condition of showing that the amount has already been deposited. If the amount required to be deposited is not deposited,

then the order would not come into force as the order is subject to that condition. The words used by the Tribunal are not that they shall deposit the amount at any time before hearing on merits, but the words used are "subject to showing that they have pre-deposited the disputed duty amount". Thus, the Tribunal in clear terms, directed that if they have already complied with the direction of depositing the amount, then the order of setting aside the impugned order and remanding the matter will come into force and not otherwise. If the Tribunal was of the view that either time is to be extended or on account of hardship, amount is to be reduced then, such specific order would have been passed. The order was passed on 20.4.1998. Thereafter, the appellants have observed silence. But after introduction of the Kar Vivad Samadhan Scheme, 1998, namely; on 1.9.1998, they became conscious of the fact that some directions have been given by the Tribunal.

6. Mr Paresh Dave, learned Advocate appearing for the petitioners in all these matters, submitted that by letters dated 5.11.1998, 30.10.1998 and 30.10.1998 in Special Civil Application No.1664/99 and similar other matters, the petitioners were called upon to take the benefit of Kar Vivad Samadhan Scheme and it is because of their invitation, forms were filled in. It is submitted that on 22.1.1999, Superintendent (Appeals), Central Excise and Customs, Ahmedabad addressed a letter drawing attention of the petitioners to the order passed by the Tribunal directing the Commissioner (Appeals), to reopen the cases on the condition that the Appellants first pay 100% duty amount and the date on which letter was addressed, no proof of payment of the amount to that office was furnished. The petitioners were requested to send proof of the payment of the amount to the office within 7 days of the receipt of the letter. No proof as demanded was forwarded to the author of the letter. On the basis of the letter, Mr Dave submitted that the letter was written because the appeal was kept alive. It is mis-interpretation of this letter. As the Tribunal passed the order in April, 1998 which was conditional one, the officer must have addressed the letter with a view to see that the order in original may not be executed, if the amount is deposited in the Tribunal or before the Appellate Authority and secondly, with a view to see that if any time i.e. before the order passed by the Tribunal, the amount is deposited, the Appellate Authority may not commit any breach of the order passed by the Tribunal in not hearing the Appellants. Thus, it was not with a view to invite the petitioners to deposit

the amount but it was only with a view to show evidence that the order passed by the Tribunal has been complied with by the petitioners.

7. It appears that by order dated 10.2.1999, office of the Commissioner of Central Excise addressed a letter indicating that the Tribunal has disposed of the Appeal and the Commissioner (Appeals) has not restored the appeal because the Tribunal's directions have not been complied with. In view of this, the petitioners were informed that there is no dispute to resolve under the Kar Vivad Samadhan Scheme, and therefore, declaration cannot be entertained as provided under Section 95 (ii) (c) of the Kar Vivad Samadhan Scheme, 1998 (hereinafter referred to as 'the Scheme of 1998'). Mr Dave submitted that these orders communicated to the petitioners are perverse orders. According to his submission, the appeals were pending. He invited our attention to Chapter VIA and Section 35F of the Central Excise Act, 1944, Section 35F reads as under:

"35F -Where in any appeal under this Chapter, the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of central excise authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit with the adjudicating authority the duty demanded or the penalty levied.

PROVIDED that where in any particular case, the Commissioner (Appeals) or the Appellate Tribunal is of opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such person, the Commissioner (Appeals) or, as the case may be, the Appellate Tribunal, may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interests of revenue."

According to his submission, the Appeals cannot be dismissed and are required to be heard on merit as per the order passed by the Tribunal, irrespective of non-compliance of the direction. He further submitted that in a given case, if the Appellant has not deposited the amount as required, then in that case, there will be no question of dismissing the appeal, but the appeal will have to be heard on merits and it would be for the adjudicating authority to recover the amount from the

person against whom the order is passed.

The provision of Section 35F is unlike the provisions contained in Civil Procedure Code with regard to the Appeals. Under the provisions of Section 30 contained in the Workmen's Compensation Act, 1923, if the certificate to the effect that the appellant, in case of an employer, has deposited the amount payable, is not filed within the period of limitation, the appeal will be untenable. There is no provision for stay of the order passed by the Commissioner under the Workmen's Compensation Act, 1923. There may be an order to withhold payments of any sum in deposit with him i.e. Commissioner. In the Central Excise Act, 1944 and Customs Act, 1962, it is mandatory to deposit with the adjudicating authority the duty demanded or the penalty levied.

8. It is required to be noted that it is a matter pertaining to revenue. The legislature, considering the fact that the appeals are preferred on frivolous ground and with a view to avoid duty, made it compulsory for the appellants to deposit the amount namely; the amount as assessed by the appropriate authority, including the duty, penalty and fine. With a view to see that a person on account of hardship may not suffer, legislature has made a provision in proviso to Section 35F which gives power to the Commissioner (Appeals) or Appellate Tribunal, if the grounds are made out to dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interests of revenue. Thus, even while dispensing with deposit of amount as ordered by the adjudicating authority, the Commissioner (Appeals) or the Appellate Tribunal is required to safeguard the interests of revenue. It may be by way of direction to deposit particular percentage of amount looking to the facts of the case, or may be by directing to execute a bond or furnish a bank guarantee of particular amount etc.

9. Mr Dave submitted that in view of the Apex Court's judgment in the case of Shyam Kishore v. Municipal Corporation of Delhi, reported in AIR 1992 SC 2279, the Appeals can be admitted or entertained but the appeals may not be heard or disposed of without pre-deposit of the disputed duty amount etc. He further submitted that the assessee may not be able to deposit the amount while filing the appeal or may not be able to pay it up within a short time or at any date before the appeal comes up for hearing in the normal course. He submitted that in the instant case also the appeals are pending. Sections 169 and 170 of the Delhi Municipal

Corporation Act were considered by the Apex Court. Sections 169 and 170 are as under:

"169. Appeal against assessment, etc.

(i) An appeal against the levy of assessment of any tax under this Act shall lie to the court of the District Judge of Delhi.

(2) to (6).....

"170. Conditions of right to appeal.

No appeal shall be heard or determined under S.

169 unless -

(a) the appeal is, in the case of a property tax, brought within thirty days next after the date of authentication of the assessment list under S. 124 (exclusive of the time requisite for obtaining a copy of the relevant entries therein), or, as the case may be, within thirty days of the date on which an amendment is finally made under S.126, and, in the case of any other tax, within thirty days next after the date of the receipt of the notice of assessment or of alteration of assessment or, if no notice has been given, within thirty days after the date of the presentation of the first bill or, as the case may be, the first notice of demand in respect thereof.

Provided that an appeal may be admitted after the expiration of the period prescribed therefor by this section if the appellant satisfies the Court that he had sufficient cause for not preferring the appeal within that period:

(b) the amount, if any, in dispute in the appeal has been deposited by the appellant in the office of the Corporation."

On reading section 170, it is very clear that the appeal shall not be heard till the amount has been deposited by the appellant in the office of the Corporation.

10. In the instant case, we find provisions of Section 35F of the Central Excise Act, 1944 similar to Section 129-E of the Customs Act, 1962. It is required to be noted that as the appeals were dismissed for non-compliance of the order passed by the Commissioner (appeals) on stay applications, the applicants preferred

appeals and invited the order to the effect that subject to condition of showing that appellants have pre-deposited the amount, the appeals may be heard. Thus, under section 35F of the Central Excise Act, the Commissioner (Appeals) was satisfied on the material, namely; the order passed by adjudicating authority, the appeal memo and the application for stay, that it is not a case where the appellants will suffer on account of hardship. In appeal Tribunal has not modified the order except that if the order is already complied with before passing the order by the Tribunal, the appeal be heard on merits. Thus, the satisfaction reached by the Commissioner (Appeals) has been confirmed.

11. The Apex court in the case of Shyam Kishore vs.Municipal Corporation of Delhi, (1993) 1 SCC 22, considered the decision of the Apex Court in the case of Vijay Prakash vs. Collector of Customs (Preventive),Bombay, AIR 1988 SC 2010. The Apex court pointed out that right to appeal is neither an absolute right nor an ingredient of natural justice the principles of which must be followed in all judicial and quasi-judicial adjudication. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grant. It is not the law that adjudication by itself following the rules of natural justice would be violative of any right-Constitutional or statutory without any right of appeal, as such. If the Statute gives a right to appeal upon certain conditions, it is upon fulfilment of those conditions that the right becomes vested and exercisable to the appellant. In that case, proceedings for breach of Foreign Exchange Regulations Act,1973 were instituted. The enforcement directorate under the provisions of the Customs Act imposed a penalty of Rs.3,00,000/- on the appellants. Against that order, the appellants preferred respective appeals to the Appellate Tribunal under section 129-A of the Act. The Appellate Tribunal reduced the amount of penalty to be deposited with application under section 129E of the Act pending hearing of the appeal ,to Rs.1,00,00/- for each of the appellants. The Appellate Tribunal was moved for further reduction and after considering the facts and circumstances of the case and taking into consideration all the relevant material facts and factors, by its order dated 17th February 1987, declined to do so and dismissed the appeals for non-compliance with the provisions of section 129E of the Act.

12. Section 129E of the Act as stated above, is similar to section 35F of the Central Excise Act. In

para 5, the Apex court pointed out that the aforesaid section provides a conditional right of appeal in respect of an appeal against the duty demanded or penalty levied. Although the section does not expressly provide for rejection of the appeal for non-deposit of duty or penalty, yet it makes it obligatory on the appellant to deposit the duty or penalty, pending the appeal failing which, the Appellate Tribunal is fully competent to reject the appeal. The proviso, however,, gives power to the Appellate authority to dispense with such deposit unconditionally or subject to such conditions in cases of undue hardships. It is a matter of judicial discretion of the Appellate Authority.

13. In para 8 of the judgment, the Apex court pointed out that -

"In the instant case, the only substantive right is the right of appeal as contemplated under Ss. 129A and 129E of the Act and that right is a conditional one and the Legislature in its wisdom has imposed that condition. No question of whittling down that right by an alteration of procedure arises in this case."

The Apex court pointed out in para 11-

"Here, we are concerned with the right given under S.129A of the Act as controlled by section 129E of the Act and that right is with a condition and thus a conditional right. The petitioner in this case has no absolute right of stay. He could obtain stay of realisation of tax levied or penalty imposed in an appeal subject to the limitations of S.129E. The proviso gives a discretion to the authority to dispense with the obligation to deposit in case of "undue hardships"..... In this case, it is manifest that the order of the Tribunal was passed honestly, bona fide and having regard to the plea of 'undue hardship' as canvassed by the appellant."

The proviso to section 129E of the Act gives a discretion to the Tribunal in cases of undue hardships to condone the obligation to deposit. It is a discretion vested in an obligation to act judiciously and properly. The Apex court pointed out that the purpose of the section is to act in terrorem to make the people comply with the provisions of law. The court rejected the appeal preferred by the persons whose appeals were dismissed for

noncompliance of the order passed by the Appellate Tribunal. In the instant case, the same being the position, the applicants have no case.

14. Mr. Dave further submitted that the trade notice issued by the Central Government makes it clear that pre-deposit of tax or penalty is not a condition precedent for filing, admittance of an appeal under either of the aforesaid enactments. (Central Excise Act, 1944 and Customs Act, 1962). It appears that with a view to explain the scope of section 95 (ii)(c), the explanation has been given. Section 95 (ii)(c) of Kar Vivad Samadhan Scheme, 1998 reads as under:

"95. The provisions of the Scheme shall not apply -

(i) xxx xxx

(ii) in respect of tax arrears under any indirect tax enactment.

(a) xxx xxx

(b) xxx xxx

(c) In a case where no appeal or

reference or writ petition is admitted and pending before any appellate authority or High Court or the Supreme Court or no application for revision is pending before the Central Government on the date of declaration made under Section 88."

Thus, if appeal is preferred and is admitted, but not pending on the date when declaration is made under section 88, the Scheme is not attracted. Dismissal of appeals may be for non-compliance of the order passed in stay application. In the instant case, order of remand was conditional and there was failure to deposit the amount. As the order was conditional, would become operative only if condition was fulfilled. Question of remand will arise only if appellant has pre-deposited the amount and material is placed to show that the order is already complied with by pre-depositing the amount. For pre-deposit no time was granted.

15. Trade notice on which reliance is placed, reads as under:

"The expression 'admitted and pending' in Section 95(ii)(c) of the Scheme with reference to Central

Excise Act, 1944 and customs Act, 1962 (where no formal procedure for admission of appeal before Commissioner (Appeals) and CEGAT has been provided) will mean the proof of filing an appeal after complying with requirements as provided in Chapter VI (it should be VIA) of the Central Excise Act, 1944 and Chapter XV of the Customs Act, 1962."

We have referred hereinabove as Chapter VIA because, it clearly appears that it is a typographical error. If Chapter XV of the Customs Act is perused, it becomes clear that reading the various provisions of the Chapter referred in the Central Excise Act, 1944 must be Chapter VIA and not Chapter VI. If that be so, the word 'admitted and pending' means proof of filing appeal after compliance with the requirement as provided namely; under Section 35F and Section 129-E of the Central Excise Act and the Customs Act, 1962 respectively. Requirement of the provisions means a person desirous of appealing against a decision or order shall pending the appeal deposit with the adjudicating authority duty demanded or penalty levied unless otherwise directed by the Commissioner (Appeals) or the Appellate Tribunal in consonance with the proviso. Appeal can be said to be admitted and pending if the duty demanded or penalty levied is deposited with the adjudicating authority as per direction of Commissioner (Appeal) or the Tribunal, and the person aggrieved, has acted as per such direction. If the direction of Commissioner (Appeals) or the Tribunal is not carried out and by a speaking order, if the Appeal is dismissed for non-compliance of the condition, appeal cannot be said to be pending.

Mr Dave put emphasise on the following sentence:

"It may be observed that pre-deposit of tax or penalty is not condition precedent for filing admittance of appeal under either of the aforesaid enactment."

So far as the case involving delayed appeal filed before the Commissioner (Appeals), CEGAT beyond the normal period of limitation, it is pointed out that the same may be entertained under the scheme only if proof of conditions of the appeal for late filing before the Commissioner (Appeals) or admittance by CEGAT as provided under the relevant provisions of the statute itself is produced. The part on which the emphasis is placed by Mr Dave refers to the matters where there is delay and the amount has not been paid as application for condonation

of delay has been made. Entire clarification has to be read and a sentence cannot be picked up for construction. It may not apply to a situation where stay application was earlier rejected as a result of which the Commissioner (Appeals) dismissed the matter and the CEGAT passed an order which is a conditional one. In view of this, we find no force in the arguments of Mr Dave. It is required to be noted that in the instant case, as the appeals were not pending, the order dated 10.2.1997 came to be passed. The views of the Commissioner, Central Excise, Ahmedabad, are that there is no dispute to resolve under the Kar Vivad Samadhan Scheme, 1998. If the appeal was pending, the situation would have been quite different.

16. In view of what we have stated above, we find no merits and the petitions stand dismissed with cost which is quantified at Rs.5000/- in each petition.

Rule in each petition discharged.

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msp.